No. 18199

United States
COURT OF APPEALS
for the Ninth Circuit

CLARA RUDICK,

Appellant,

v.

PIONEER MEMORIAL HOSPITAL,
DENISON M. THOMAS, M.D., and
CHARLES E. DONLEY, M.D.,

Appellees.

BRIEF OF APPELLEE DENISON M. THOMAS, M.D.

On Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, Judge.

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SUBJECT INDEX

TABLE OF CASES

OTHER AUTHORITIES

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STATEMENT OF THE CASE

In this malpractice action, plaintiff sought to recover $125,000 general damages and over $8,000 in special damages from Prineville Memorial Hospital, Dr. Denison M. Thomas, a Prineville, Oregon general physician, and Dr. Charles E. Donley, a Bend, Oregon physician specializing in the field of radiology and roentgenology (Pretrial order, pp. 3-5).

Plaintiff claimed that as the result of an automobile accident near Mitchell, Oregon, on May 25, 1957, she suffered "a fracture of the vertebra of her neck, the fifth cervical vertebra and a compression fracture of the sixth cervical vertebra and a subluxation or dislocation of the vertebra of her neck." It was claimed that defendants "so negligently and carelessly examined and treated plaintiff that as a proximate result of said negligence said previous injury to the plaintiff's neck was aggravated" and plaintiff suffered further painful and permanent injuries as well as mental anguish (Pretrial order, p. 3).

Earlier proceedings herein are summarized in this Court's opinion (296 F.2d 316) passing upon plaintiff's appeal from a judgment holding that her general release to the driver of the automobile for a payment to her of $4250 barred the prosecution of this action. For reasons therein stated, this Court reversed the case "with instructions that judgment upon the segregated issue be set aside and for further consideration and determination of that issue upon the present record in the light of this opinion" (296 F.2d at p. 320).

Following receipt of this Court's mandate, the district court set this case for trial before a jury on the issues presented in the pretrial order, excluding the release issue.

At the commencement of the trial, the court approved the dismissal by stipulation of the action as against defendant hospital (Tr. 2). At the close of plaintiff's medical testimony, the court granted defendant Donley's mo-

tion for a directed verdict and plaintiff's trial counsel made no objection to the court's ruling (Tr. 215-216). The case was submitted to the jury against defendant Thomas alone and the jury returned a general verdict in his favor. No motion for a new trial was filed.

PROCEDURAL RULES INVOLVED

Rule 46 of the Federal Rules of Civil Procedure provides:

> "Rule 46. Exceptions Unnecessary
>
> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Rule 51 of the Federal Rules of Civil Procedure provides:

> "Rule 51. Instructions to Jury: Objection
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly

the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

SUMMARY OF ARGUMENT

1. The fact that plaintiff's brief completely disregards this Court's rules is sufficient reason for dismissal of this appeal.
2. Alleged errors in trial court proceedings may not be raised for the first time in this Court.
3. Even if the claimed errors had been properly raised below, they are completely lacking in merit.

ARGUMENT

I

Plaintiff's Violations of Rule 18 Are Sufficient Grounds for Dismissal of this Appeal.

Preliminarily, we are constrained to point out that plaintiff's brief completely disregards the requirements of Rule 18 of this Court's rules, which this Court has repeatedly held must be observed (*Pacific Queen Fisheries* v. *Symes,* 307 F.2d 700, 705 (CA 9)). For this reason alone, dismissal of this appeal is warranted (*Thys Co.* v. *Anglo California National Bank,* 219 F.2d 131, 133 (CA 9), cert. den. 349 U.S. 946, 75 S.Ct. 875, 99 L.Ed. 1272, rehearing denied 350 U.S. 855, 76 S.Ct. 40, 100 L.Ed 760).

Obviously, the purpose of the Court's requirement in

Rule 18, sub 2(g), that an attorney certify as to his examination of and compliance with Rules 18 and 19, was to compel adherence to the Court's rules. However, no certificate is attached to plaintiff's brief.

Many other obvious violations of Rule 18 can be found in this brief:

1. There is no table of exhibits (Rule 18, sub 2(f)).
2. There is no summary of the argument (Rule 18, sub 2(e)).
3. Most of the alleged specifications of error do not conform to the requirements of Rule 18, sub 2(d), since
   (a) the alleged errors are not set out "separately and particularly";
   (b) with respect to the alleged errors as to admission of evidence, the specifications do not quote "the full substance of the evidence admitted," and do not "quote the grounds urged at the trial for the objection";
   (c) with respect to alleged errors as to the court's charge, the specifications do not "set out the part referred to totidem verbis" and "the grounds of the objections urged at the trial" are not shown.

As will appear presently, the failure to set out the grounds of objections made in the district court is not merely a technical defect, for the record shows that no objections were ever asserted during the trial.

II

No Objections Having Been Made at the Trial, the Alleged Errors May not Be Considered by this Court.

When separated, the alleged errors with respect to the trial proceedings (Specifications of Error Nos. 2-13, App. br., pp. 24-26) fall into six main categories:

1. that the trial court erred in its rulings on direct and cross-examination (Nos. 2-3);
2. that the trial court erred in its own examination of certain witnesses (Nos. 4-5);
3. that the trial court erred in its comments during the trial (Nos. 6-7);
4. that the trial court erred in receiving inadmissible testimony (No. 7);
5. that the trial court erred in its instructions to the jury (Nos. 8-10, 13);
6. that the trial court should have directed a verdict for plaintiff, or that the trial court should have set aside the verdict which the jury returned against the plaintiff (Nos. 11-12).

A perusal of the transcript of testimony demonstrates that this Court cannot review any of the alleged errors because plaintiff's trial counsel made no objection whatsoever at the trial to any of the court's actions or rulings; nor did he make a motion for a directed verdict in plaintiff's favor, or for judgment n.o.v. With respect to the jury instructions, the only objection made was unintelligible and is not relied upon by plaintiff in this Court (Tr. 298).

Two fundamental rules of federal court trial procedure are Rule 46, FRCP, and Rule 51, FRCP, quoted above. As applied to this case, Rule 46 required that plaintiff's trial counsel make known to the district court the action he desired the court to take, or his objection to the action of the court and his grounds therefor. Rule 51 required that before the jury retired, plaintiff's trial counsel object to instructions given and state distinctly the matter to which he objected and the grounds of his objection (see discussion 2B *Barron and Holtzoff, Federal Practice and Procedure,* § 1021, pp. 309-319, and §§ 1103-1104, pp. 450-465, and cases cited therein; see also discussion Vol. 13, *Cyclopedia of Federal Procedure* (3rd Ed.), Chapter 59, pp. 331-381).

In *Johnston* v. *Reilly,* 160 F.2d 249, 250 (Ct. App. D.C.), the court referred to Rule 46 as "a codification of the rule already existing" and further stated:

> "This is not a mere technicality but is of substance in the administration of the business of the courts. Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below. Almost every case would in effect be tried twice under any such practice. While the rule may work hardship in individual cases, it is necessary that its integrity be preserved."

Plaintiff's counsel relies upon the decision of the Court of Appeals for the Third Circuit in *Callwood* v. *Callwood,* 233 F.2d 784, 788, for the proposition that this Court can consider objections made for the first time on appeal where "the error in the charge was fundamental and highly prejudicial, and our failure to con-

sider the error would result in a gross miscarriage of justice." This is merely a statement of the "plain error" rule which some federal appellate courts apply to civil appeals.

While we vigorously deny that the trial court committed error, plaintiff could fare no better even if this Court discovered "fundamental and highly prejudicial" error urged for the first time on appeal.

This Court has repeatedly held "that the 'plain error' rule may not be utilized in civil appeals to obtain a review of instructions given or refused where the ground asserted was not voiced in the trial court" (*Hargrave* v. *Wellman,* 276 F.2d 948, 950 (CA 9), followed in *Bertrand* v. *Southern Pacific Co.,* 282 F.2d 569, 572 (CA 9), cert. den. 365 U.S. 816, 81 S.Ct. 697, 5 L.Ed. 2d 694).

In commenting upon these cases, Vol. 2B, *Barron and Holtzoff, Federal Practice and Procedure,* § 1106, pp. 474-475, states:

> "* * * At least one circuit reads the rule literally, and holds that it does not have power to reverse even for plain error. Such a reading, in addition to being consistent with what the rule says, undoubtedly spares that circuit from the burden of having to review afterthought claims of errors in the instructions which counsel attempt to bring forward under the banner of plain error. * * *"

Illustrations of the application of Rules 46 and 51 by recent decisions of this Court are found in *Brown* v. *Chapman,* 304 F.2d 149, 154 (CA 9) [instructions]; *Dale Benz, Contractors* v. *American Casualty Company,* 305 F.2d 641, 643 (CA 9) [necessity of obtaining ruling

upon objections to evidence]; *Bohauer* v. *Friedman,* 306 F.2d 933, 937 (CA 9) [genuineness of document first challenged on appeal]; *Southern Pacific Company* v. *Villarruel,* 307 F.2d 414, 415 (CA 9) [new ground of objection to instruction]; and cf. *Frank* v. *International Canadian Corporation,* 308 F.2d 520, 529 (CA 9) [attempt on appeal to depart from pretrial order].

Thus, since the record is barren of any objections made at trial with respect to the multitude of "errors" of which plaintiff now complains, the above-cited authorities clearly show that there is nothing for the Court to review on the appeal from the judgment in favor of Dr. Thomas.

III

In Any Event, the Alleged Errors Are Without Merit

Notwithstanding the absence of grounds for review, we cannot close this brief without briefly pointing out the frivolous nature of the alleged errors which plaintiff's counsel seeks to raise for the first time in this Court. In this connection, we will only comment on the alleged errors mentioned on pages 34-45 of plaintiff's brief which are claimed to have been "more serious and prejudicial" than certain other alleged errors mentioned in the "Specifications of Error," but not argued.

1. First, it is claimed that the trial court committed prejudicial error with respect to the examination of Dr. Donley. The transcript clearly shows that the court's questions were clear and to the point (Tr. 73-75). Furthermore, the court invited plaintiff's counsel to ask further questions (Tr. 75).

2. It is also claimed that the court was guilty of prejudicial error in its examination of plaintiff's witness, Dr. Shipps. Again, the transcript clearly shows that the court did not act arbitrarily in conducting a clear and elucidating examination of the witness (Tr. 126-129). With respect to the trial court's right and duty to facilitate the orderly progress of the trial by participating in the examination of witnesses, we refer the Court to Judge Bone's opinion in *Ochoa* v. *United States,* 167 F.2d 341, 344 (CA 9).

3. Complaint is made that the court erred in admonishing the plaintiff when she commenced to characterize her surgery as "a horrible thing" (Tr. 143). To tell the witness to answer the question, and not make side remarks, certainly was within the trial court's discretion.

4. Next, the court's admonition to Dr. Stern not to be coy, but to give his full opinion and not hold back, was perfectly proper in view of his previous testimony, for he had stated that his previous answer was not his full answer (Tr. 206-207).

5. The claim that the court required plaintiff's counsel to examine Dr. Donley as his own witness misses the point. The record (Tr. 68) shows that when plaintiff's counsel commenced to interrogate Dr. Donley on matters that related to his case against Dr. Thomas, the court asked counsel whether he was calling Dr. Donley as his own witness. Counsel agreed that he was "for this limited function" (Tr. 68).

6. Error is predicated on the trial court's comments on plaintiff's injuries and condition (Tr. 225). Not only does any federal judge have broad powers to comment on the evidence but the court specifically instructed the jury: "Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts" (Tr. 281), and "* * * you are to decide the questions of fact involved in this case solely upon the basis of the evidence that has been introduced in this case" (Tr. 281) [see opinion of Judge Healy in *Bradley Min. Co.* v. *Boice,* 194 F.2d 80, 83 (CA 9)].

7. The contention is made that error was committed in allowing plaintiff to testify on cross-examination that she had received $4250 in settlement from the driver of the automobile. Paragraph V of defendant's contentions in the pretrial order made this evidence relevant (Pretrial order, p. 7). Under Oregon law, such evidence was admissible since Locke and defendants stood in the position of joint tort-feasors. Even if the release was to be construed as a covenant not to sue, the amount received in that settlement would have been properly deducted by the court from any verdict which plaintiff had obtained against Dr. Thomas (see *Southern Pacific Co.* v. *Raish,* 205 F.2d 389, 393 (CA 9)). The jury was not instructed on this procedure (Tr. 276-277). As for the court's comment, plaintiff's counsel fails to note that all the trial proceedings at pages 270-

278 of the transcript of testimony were outside the presence of the jury.

8. With respect to alleged errors in the court's instructions to the jury, it is probably sufficient to point out that the instruction to the effect that a mere error in judgment is not negligence (Tr. 285-286) is a correct statement of Oregon law (*Malila* v. *Meacham,* 187 Or 330, 354-355, 211 P.2d 747, followed in *Eckleberry* v. *Kaiser Foundation,* 226 Or. 616, 626-627, 359 P.2d 1090). The remainder of the claimed errors in instructions (App. br., pp. 42-44) relate solely to the question of damages. However, since the jury returned a general verdict in favor of Dr. Thomas on the issue of liability, it never reached the question of damages, so any possible error in the instructions on that subject was harmless (*Blanton* v. *Great Atlantic & Pacific Tea Co.,* 61 F.2d 427, 429 (CA 5); *Bryne* v. *Greene,* 70 F.2d 137, 139 (CA 1); *Ackelson* v. *Brown,* 264 F.2d 543, 547 (CA 8)).

9. In conclusion, error is predicated on the assertion that the jury's verdict was contrary to law and contrary to the evidence, and that there was no substantial or preponderant evidence to support the jury's verdict. The short answer is that while plaintiff may have made out a sufficient case for submission to the jury as to the negligence of Dr. Thomas, the evidence did not require that the court direct a verdict in her favor, and plaintiff's counsel did not move for a directed verdict,

or for judgment n.o.v., or for a new trial. Thus, there is nothing for this Court to consider (*Trans World Airlines* v. *Shirley,* 295 F.2d 678 (CA 9)). Without discussing the sufficiency of the evidence of Dr. Thomas's alleged negligence, it is enough to note that the jury could have found in his favor on merely the testimony of the expert witness, Dr. Samuel R. Orr (Tr. 244-254).

CONCLUSION

This appeal appears to us "to closely approach the frivolous and vexatious" (*Cakmar* v. *Hoy,* 265 F.2d 59, 62 (CA 9)). Plaintiff's new appellate counsel obviously entered into his representation of plaintiff without being apprised of the trial court record. His willingness to proceed with the appeal against Dr. Thomas must be attributed to zeal for his client, rather than a dispassionate consideration of the merits of the appeal.

In fact, this appeal is without merit and should either be dismissed, or the judgment of the district court in favor of Dr. Thomas should be affirmed, with costs.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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